

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANT
AND JOINT APPENDIX

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,813

403

WILLIE G. BRIGHTHART,
Appellant,

v.

TED McKAY,
Appellee.

APPEAL FROM THE UNITED STATES
DISTRICT COURT FOR THE
DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 5 1968

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(i)

STATEMENT OF QUESTIONS PRESENTED

1. Does contribution lie against a party who was not at fault?
2. Does one defendant against whom a \$50,000.00 judgment was rendered have a right of contribution against a second defendant even though the second defendant was absolved by the jury from liability for the plaintiff's injuries?
3. Should a decision in a case in which appellant did not participate be binding upon him and seriously prejudice his rights in a different suit?
4. Can appellee use the doctrine of *res judicata* defensively and at the same time prevent the appellant from using the doctrine offensively?
5. Can appellee successfully adopt diametrically opposed defenses which mislead the appellant and cause him to settle his claim with one of the defendants at appellant's ultimate detriment?
6. Can appellee successfully claim that he was not at fault in causing an accident and that he should therefore be completely absolved for the plaintiff's damages, and at the same time assert that if he is found at fault, he need pay only one-half of the award since he and a co-defendant were liable as a matter of law to the plaintiff?

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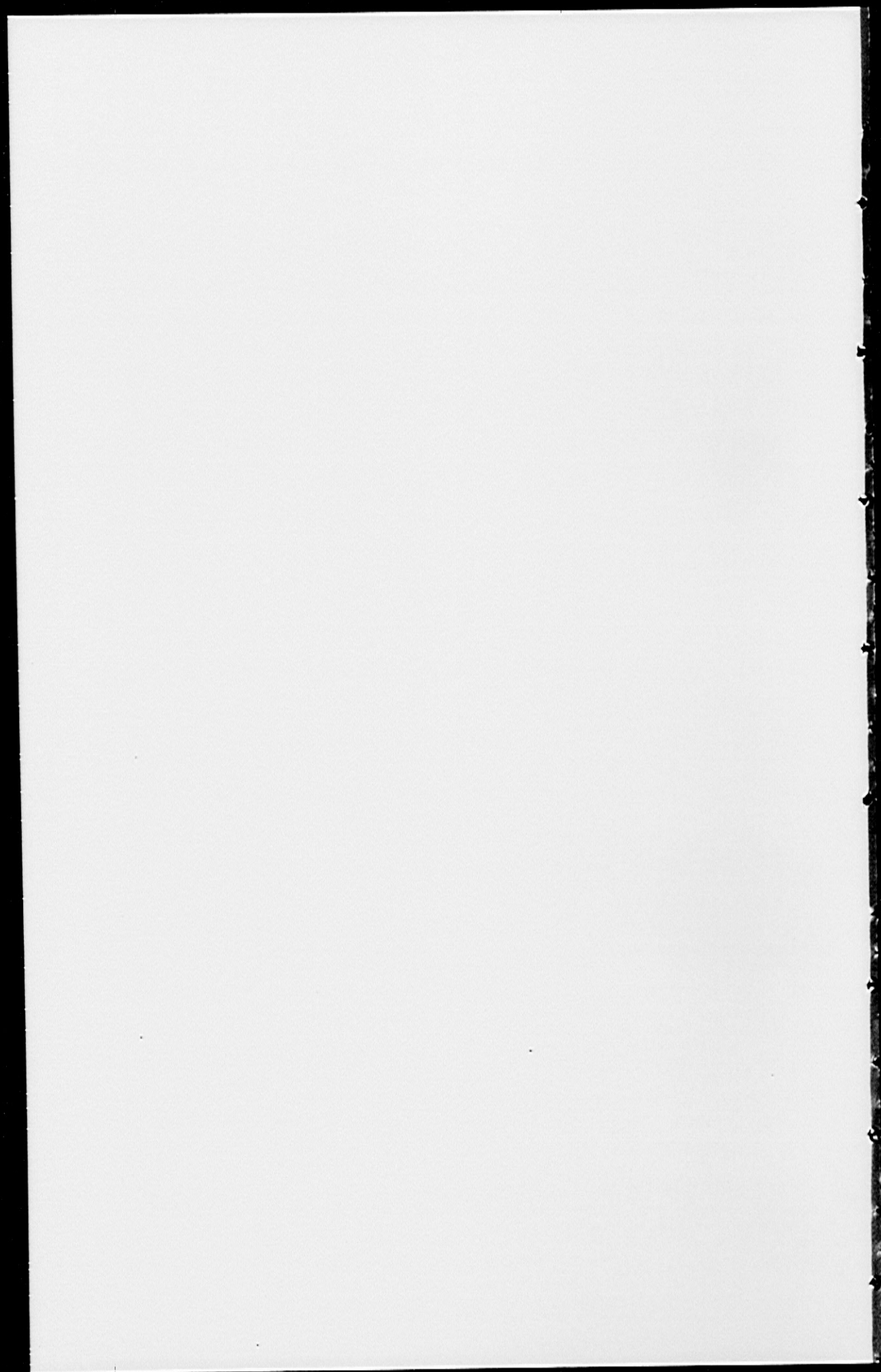
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IN THE
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,813

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Appellant,

v.

TED McKAY,
Appellee.

APPEAL FROM THE UNITED STATES
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DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This Court has jurisdiction to review the Order of the United States District Court under authority of Title 28, United States Code, Sec. 1291, and Title 11, Sec. 321(a), D. C. Code (1967 Ed.). Notice of appeal was timely filed on February 27, 1968. The District Court had jurisdiction of this matter under Title 11, Sec. 521(a)(1), D. C. Code (1967 Ed.)

STATEMENT OF THE CASE

Appellant was awarded a jury verdict against appellee McKay in the amount of \$50,000.00. The other defendant below, Smith, was at the same time absolved. However, even though the jury believed Smith was not negligent in the accident, the trial judge ordered contribution by him and additionally, by a remittitur, effectively reduced the verdict to \$15,000.00. (J.A. 4, 5)

Appellant, who was twenty-five years of age at the time of trial, worked for the Drug Fair chain stores since his discharge from the United States Air Force. He started working as a porter, had been promoted several times, and at the time of trial was a salesman. (J. A. 5) As a result of the accident in question, appellant suffered irreparable disfiguring scars in conspicuous areas of his face. (J.A. 5) Additionally, appellant's right shoulder muscles were severed when he was thrown through the windshield of the car in which he was a passenger, and he sustained a permanent weakness to his right arm and shoulder. (J.A. 5) The appellant sustained other serious injuries. (J.A. 4, 5)

The accident occurred on August 9, 1965 when appellant, Willie G. Brighthart, was a passenger in a car driven by Melvin Smith. The Smith car was proceeding North on Seventh Street N.W. and was entering the intersection of M Street, when appellee Ted McKay, travelling in the opposite direction on Seventh Street, suddenly turned left into the path of the Smith vehicle. (J.A. 1)

Appellant sued both the "host driver", Melvin Smith, and appellee Ted McKay. From their first pleading through their closing statement to the jury, both drivers denied that they were in any way at fault in causing the accident. Additionally, each driver filed a cross-claim against the other. (J.A. 1)

While the action in the United States District Court was pending, Melvin Smith, the "host driver", sued appellee Ted McKay in the District of Columbia Court of General Ses-

sions, which case was styled *Smith v. McKay*, Civil Action No. GS 22593-65. In that suit, Melvin Smith was denied recovery against appellee Ted McKay on the grounds that both parties were negligent and the doctrine of contributory negligence barred relief. (J.A. 3) Appellant Willie G. Brighthart was not a party to the General Sessions Court suit. Melvin Smith's attorney in the General Sessions Court was not the same as his attorney in the United States District Court.

At the Pre-Trial Conference in the instant case, appellee Ted McKay again denied that he was liable for the plaintiff's injuries and caused the following to be inserted in the Pre-Trial Examiner's statement:

"Further, *McKay alleges that if he is in fact found negligent, that he is entitled to a judgment for contribution* against defendant Smith as a matter of law in that the Honorable Judge Mary Barlow in the District of Columbia Court of General Sessions has judicially determined that Melvin Smith was guilty of contributory negligence in this action." (emphasis supplied) (Agreed Statement of the Case, p. 1)

Prior to trial in the United States District Court, appellant correctly predicted that on the basis of the traffic regulations and the clear facts of the case, the District Court jury would absolve the "host driver", Melvin Smith, from liability notwithstanding the result of the General Sessions Court suit. Appellant therefore settled his case against Melvin Smith for only \$7,000.00 and signed a release from further liability on the part of Smith. (J.A. 2)

When the case came on for trial in the United States District Court, on January 11, 1968, plaintiff's settlement with Smith was not made known to the jury and the case was presented in its original form, to wit, *Willie G. Brighthart v. Ted McKay and Melvin Smith*. (J.A. 2) The jury held appellee Ted McKay liable for the plaintiff's damages in the amount of \$50,000.00 and absolved the "host driver", Melvin Smith, from any liability for the accident. (J.A. 2)

After the verdict was rendered, the trial court entertained appellee McKay's Motion to have co-defendant Melvin Smith held liable, as a matter of law, for one-half the judgment rendered against appellee Ted McKay. (J.A. 2)

Over appellant's objections, the trial court ruled that the judgment in the District of Columbia Court of General Sessions in Civil Action No. GS 22593-65 was *res judicata* and binding upon appellant Brighthart in the United States District Court action. The trial court held that a credit in the amount of \$25,000.00 would be entered in favor of appellee Ted McKay, thereby reducing appellant's judgment to \$25,000.00. (J.A. 3, 4, 5)

At this juncture of the case, appellant had an effective judgment of only \$25,000.00. (J.A. 4) Appellee Ted McKay then filed a Motion for a new trial, or in the alternative, that appellant be compelled to accept a remittitur. (J.A. 4) The Court granted the Motion, holding that the total judgment be reduced by \$20,000.00 and ordering a final judgment against appellee Ted McKay in the amount of only \$15,000.00. (J.A. 5)

The trial court noted:

"This will leave a judgment in the amount of \$30,000.00 against which defendant McKay will be entitled to a credit [under its previous contribution decision] of \$15,000.00." (J.A. 5)

In order to avoid the expenses of a new trial, the plaintiff filed a remittitur on February 19, 1968 reserving his right to appeal the contribution-*res judicata* aspect of the Court's decision. (J.A. 5)

The action of the trial judge caused the appellant to receive a judgment in the total amount of \$15,000.00. (J.A. 6)

STATEMENT OF POINTS

Because defendant Smith was absolved by the jury from any liability to the appellant and appellee was held completely liable for appellant's injuries, Smith should not have been held liable to appellee McKay for contribution.

The doctrine of *res judicata* should not be extended to and made binding upon persons who are not parties to the litigation.

Appellee McKay should not have been permitted to successfully mislead the appellant through the adoption of inconsistent legal positions.

SUMMARY OF THE ARGUMENT

1. The trial court should not have compelled the appellant to look to defendant Melvin Smith for payment of a portion of the jury verdict since Smith, from whom the appellant was legally precluded from recovering, was found by the jury to be free from any liability for the accident in which appellant was injured.

2. The trial court erred in its application of the *res judicata* principle.

3. The trial court erred when it allowed the appellee to take advantage of contradictory positions, which positions mislead the appellant and caused him to enter a detrimental settlement with a co-defendant.

ARGUMENT

I

Contribution Does Not Lie Unless Both Tortfeasors Are Liable for the Accident in Which Plaintiff Was Injured

The trial court held that a right of contribution exists between two defendants even though one of the defendants was absolved by the jury from liability for the plaintiff's injuries.

Appellant asserts that the trial court erred when it ruled that under the doctrine of contribution, Melvin Smith was liable to appellee McKay for a contributable portion of the award that was rendered solely against McKay. In doing so, the trial court reversed a clear and established line of authority on the subject of contribution. 18 Am.Jur. 2d, *Contribution*, § 47; 18 ALR 2d 1001.

The *Restatement of Law, Restitution*, § 81, provides:

"Unless otherwise agreed, a person who has discharged more than his proportionate share of a duty owed by himself and another as to which, between the two, neither had a prior duty of performance, is entitled to contribution from the other, . . ."
(emphasis supplied)

Title C of § 85 of the *Restatement of Law, Restitution*, provides the following:

"Indemnity And Contribution Between Tortfeasors.

"The principles underlying the rules with respect to restitution for payments made by a person in discharge of a duty to which he and another are both subject are the same whether the duty arose from a contract, from a quasi contractual situation or from a tort. Thus, where two persons have engaged in an enterprise *during the course of which liabilities are incurred against both*, one of them who discharges the liability is entitled to indemnity or contribution, . . ." (emphasis supplied)

The common or joint liability for the plaintiff's damages may arise in several ways. The most usual situation is a plaintiff's suit against two or more defendants, as occurred in the instant case. But contribution is not dependent upon whom the plaintiff chooses to sue. Thus, a defendant can institute a third-party action against a tortfeasor and by that means have the trier of the fact establish the liability for the accident. *Henry Fuel Co. v. Whitebread*, 99 U.S.App. D.C. 9, 236 F.2d 742, (1956). To establish liability, the judgment need not be rendered in favor of the plaintiff directly against the liable tortfeasor. *Knell v. Feltman*, 85 U.S.App.D.C. 22, 174 F.2d 662 (1949). But by whatever means it is established, it is clear that a tortfeasor must be deemed wholly or partly liable for the plaintiff's damages as a prerequisite to a judgment of contribution being entered against him. *George's Radio, Inc. v. Capitol Transit Co.*, 75 U.S.App.D.C. 187, 126 F.2d 219, (1942).

It is submitted that the case of *Keleket X-ray Corp. v. United States*, 107 U.S.App.D.C. 138, 275 F.2d 167, bears an analogy to the factual pattern in the instant case. As learned in *Keleket*, the contribution doctrine is applicable even though the party sought to be charged with contribution is not directly liable to the plaintiff because of a technicality such as the running of the statute of limitations against the plaintiff. The conclusion reached in *Keleket*, is that contribution is operative only after it is decided by the trier of fact that the party sought to be charged with contribution is legally responsible for the damages sustained by the plaintiff even though that party may not be compelled to pay damages to the plaintiff.

In its decision, the trial court cites *Martello v. Hawley*, 112 U.S.App.D.C. 129, 300 F.2d 721, (1962). However, even that case holds that the right of contribution exists only where the party against whom contribution is sought, has been adjudicated to be liable for the plaintiff's damages. Therefore, it is submitted that *Martello v. Hawley*, *supra* is not supportive precedent for the trial court's conclusions.

Counsel is unable to find a single case in this jurisdiction or elsewhere where a right of contribution has been allowed against a party who has not been found wholly or partly liable for the plaintiff's injuries.

It is submitted that the trial court's decision should be reversed, not only because the letter of the case law supports appellant's position, but also because the spirit and intent of the law supports the conclusion here suggested. The theory of contribution is stated in *Martello v. Hawley*, *supra* at page 131:

"Contribution is a right existing among joint tortfeasors based upon the theory that, *as each tortfeasor was at fault in bring about the injury to the innocent party*, then in justice each tortfeasor should share his part in the burden of making the innocent party whole again." (emphasis supplied)

Since the jury exonerated defendant Smith from liability for the plaintiff's damages, the doctrine of contribution should have no legal applicability.

Notwithstanding the jury's exoneration, the trial court held defendant Smith liable as a matter of law based upon the General Sessions Court decision. The trial court did this even though the General Sessions Court suit did not involve the issue of Smith and McKay's liability for the plaintiff's injuries; the parties therein were not represented by the same attorneys and, most importantly, appellant did not participate in that suit and had no opportunity to present his case there.

For the reasons stated in the following argument, it is respectfully submitted that defendant Smith is not liable to the appellant as a matter of law under the *res judicata* doctrine, and that no right of contribution exists against him.

II

**The Doctrine of Res Judicata Does Not Bind
Persons Who Were Not Parties to a Suit or in
Privity With the Parties**

The issue in this case is whether a judgment of a lower court in a suit that appellant did not participate in can be extended to and seriously prejudice his rights in a different suit.

Appellee McKay relies upon the doctrine of *res judicata* as support for his argument that the judgment in the District of Columbia Court of General Sessions compels appellant to look to the co-defendant, Smith, for one-half of the judgment rendered even though the one-half cannot be collected. The doctrine is stated in 30 Am.Jur. Sec. 324:

"The doctrine of *res judicata* is that a final judgment rendered upon the merits, is conclusive of rights, questions and facts in issue as to the parties and their privies in all other actions in the same or any other judicial tribunal of concurrent jurisdiction."

To what extent may the General Sessions Court judgment be extended to and be binding upon persons who were not a party to, or represented in the litigation? It is axiomatic that the doctrine of *res judicata* does not operate to effect strangers to a judgment, that is, to effect the rights of those who are neither parties nor in privity with a party therein. *Restatement of Judgments*, § 82, provides:

"Non-Adversary Parties

"The rendition of a judgment in an action does not conclude parties to the action who were not adversaries under the pleadings as to their rights inter se upon matters which they did not litigate, or have an opportunity to litigate between themselves.

"a. Rationale. The rules of *res judicata* are based upon an adversary system of procedure which exists

for the purpose of giving an opportunity to persons to litigate claims against each other."¹

There are many decisions which exemplify the fact that the *res judicata* doctrine rule will not be applied in cases involving non-adversary parties. One of these cases is *Hellenic Lines v. The Exmouth*, 253 F.2d 473 (2d Cir. 1958), a suit between two steamship lines for hull damages resulting from a collision between the vessels in the Delaware Bay. On the basis of another case, *Rivera v. American Export Lines*, 13 FRD 27, the District Court held that neither ship could recover against the other since both had been previously found liable to Rivera. Rivera was a seaman on one of the ships and brought suit against both steamship lines for his injuries. In the *Rivera* case, both ships were held to be negligent and liable to the plaintiff. The Court of Appeals for the Second Circuit reversed the District Court and held that the two steamship lines could not be bound by the *Rivera* decision since the plaintiff and the defendant were not adversaries in that suit and since the precise question sought to be established, i.e., liability of the defendants to each other was not adjudicated, the doctrine of *res judicata* therefore did not apply. The Court, at page 477, said:

"Furthermore, libelant (plaintiff) cannot be deprived of litigating the whole damage issue in Admiralty and in an adversary proceeding merely because a stranger to that action elected to join it as a co-defendant in a personal injury action.

"*Yellow Cab of D.C. v. Janson*, 86 U.S.App.D.C. 38, 179 F.2d 54, does not provide precedent for the cross-libelant's argument that the joint *Rivera* judgment prevents further litigation of the mutual liability issue in subsequent hull damage trials. Had

¹The doctrines of *res judicata* and collateral estoppel appear to be indistinguishable as they relate to the questions presented in the instant case. *Lawlor v. National Screen Service*, 349 U.S. 322; *Chesapeake Industries v. Wetzel*, 265 F.2d 881.

either Hellenic or Exmouth sought to recover from the other its portion of the amount paid to Rivera, those cases might have been authority for the proposition that the Rivera judgment estopped the parties from raising the issue of mutual liability, but this is not such a suit."

Another case in point is *Kimmel v. Yankee Lines, Inc.*, 224 F.2d 644 (3rd Cir. 1955) where the administratrix of the decedent motorist, who died as the result of a collision involving himself and a tractor trailer truck, sued the truck driver for wrongful death. The truck company defended on the grounds of *res judicata* contending that a decision in a previous action brought by a truck passenger against the decedent and the truck operator which resulted in a judgment against both the decedent and the truck operator, was *res judicata* in the administratrix' action and established that both the decedent and the truck operator were negligent, thus constituting a contributory negligence bar against recovery by the decedent driver. However, the Court held that the administratrix could not be bound by a suit to which she was not a party.

In *Williams v. Atlantic Coast Line R.R. Co.*, 274 F.Supp. 216 (D.S.C. 1967), the Court considered the question of whether recovery of a judgment from the decedent's employer by a railroad for damage negligently inflicted on the railroad's property by the decedent's administrator against the railroad for wrongful death. The Court granted the administrator's Motion to strike the railroad's *res judicata* plea since there was no privity between the employee and the employer who was required to pay for the damages, and since the employee's estate was not a party to the railroad's suit.

In *Quatroche v. Consolidated Edison Co. of N.Y.*, 201 N.Y.S. 2d 520, the Court held that a plaintiff could not affirmatively assert the *res judicata* doctrine against the defendant on the basis of a judgment in a previous case to which the plaintiff was not a party. In the relied upon case,

the defendant was held liable to the plaintiff's passenger for injuries resulting from the same traffic accident on which suit is brought.

In support of its contention that the judgment of the District of Columbia Court of General Sessions in the suit between Melvin Smith and Ted McKay was not binding upon the appellant, counsel refers this Court to its decision in *Rollins v. District of Columbia*, 105 U.S.App.D.C. 155, 265 F.2d 347. There, Rollins collided with the South Capitol Street Bridge and was sued for damages by the District of Columbia in the Municipal Court. The District was awarded a judgment against Rollins. Later, Mr. Rollins and his wife filed suit against the District of Columbia in the United States District Court for personal injuries sustained by Mr. Rollins and loss of consortium sustained by Mrs. Rollins. The District Court dismissed Mr. Rollins' suit on the grounds that the Municipal Court judgment was *res judicata* as to the District's liability to him. However, the District Court also dismissed Mrs. Rollins' suit on the grounds that the issue of the District's negligence was previously adjudicated and since it was binding upon her husband, as the driver of the car, it was also binding upon herself. The dismissal of Mr. Rollins' suit was affirmed, but the dismissal of Mrs. Rollins' suit was reversed. The Court at page 156, said:

"We do not agree with the action of the District Court in respect to Mrs. Rollins. She was not a party to the action in the Municipal Court, and so the judgment there did not result in *res judicata* as to her. Her right to damages for the loss of consortium of her husband was a right belonging to her, separate and apart from any right of her husband to compensation for personal injuries."

It is worthwhile to speculate what course this Court would have taken had the District of Columbia adopted a different tactical course and instead of moving to dismiss had first made Mr. Rollins a third-party defendant to the action brought by his wife and then moved for summary judgment on the grounds that the Municipal Court action was *res judi-*

cata, and Mrs. Rollins sole ground for relief was against her husband. It is respectfully submitted that this Court would not have sanctioned the granting of a summary judgment under those circumstances for Mrs. Rollins would be deprived of her day in Court by a suit to which she was not a party. It is submitted that if the *Rollins* decision is carried to its logical conclusion it becomes analogous to the facts in the instant case where appellee McKay compels appellant to recover, although impossible to do so, from Smith by virtue of a law suit in which appellant did not participate and had no opportunity to control. The lack of merit of appellee McKay's position is best displayed when applied to several common legal situations.

If in *Smith v. McKay*, the District of Columbia Court of General Sessions had rendered a judgment against only one of the parties because the accident resulted from the sole negligence of the other, would this judgment relieve that defendant who was not found liable from a verdict rendered against him in the District Court? Appellant respectfully submits that it is doubtful that this Court would sanction such a procedure whereby a plaintiff could be deprived of his cause of action against one of the parties under the guise of *res judicata*. And yet, that is precisely what has occurred in the District Court. Appellant was adversely affected by a case in which he did not participate.

Another situation that displays the tenuousness of appellee McKay's argument is the following. The law recognizes that there are certain accidents which are not caused by the fault of either party. These are generally classified as "unavoidable accidents." *Rosasco v. Sowder*, (D.C.Mun.Ct.App., 1943,) 31 A.2d 687. If the District of Columbia Court of General Sessions had found that the accident between appellee McKay and Smith was "unavoidable" would such a decision be binding upon the appellant and prevent recovery from either McKay or Smith? It is respectfully submitted that the answer to that question would be "No."

Another situation critical of McKay's position. Assume that appellant had obtained a verdict against Smith only, and Smith having settled and owing no obligation to pay the judgment, refuses to move for contribution, could appellant force McKay to contribute under the doctrine of *res judicata*? Of course not, and if appellee could successfully stop appellant from using the doctrine offensively, appellee should not be allowed to use it defensively.

Yellow Cab Co. of D. C. v. Janson, supra provides at the most, only superficial support for appellee's position. There Mr. William Janson successfully sued the Yellow Cab Company for damages sustained in a collision. Subsequently, one of William Janson's passengers, Anna Janson, not William's wife, also sued the Yellow Cab Company for damages. By a third-party complaint, the cab company made William Janson a defendant to Anna Janson's law suit. William Janson successfully moved for summary judgment contending that the previous suit between him and the cab company constituted *res judicata*. But the *Yellow Cab* decision is not analogous to the situation in the instant case because there the rights of the plaintiff were in no way affected.

The doctrine which appellee McKay asks the Court to apply here may have far-reaching undesirable consequences. If persons were bound by cases to which they were not a party, it would be incumbent upon them to ask the District Court to enjoin any action which may even tangentially affect their rights in other litigation. Such a procedure would result in increased and often wasteful use of the Court's time, Court backlog and delays, and hardship to the litigants against whom the injunction is sought.

As stated earlier, one of the questions presented is whether appellee could use the *res judicata* doctrine defensively and at the same time resist appellant's offensive use of it. Appellee McKay's argument that appellant must look to defendant Smith for payment of one-half of the judgment because the decision of the General Sessions Court is *res judicata*,

is belied by appellee's tactics in the United States District Court. If the General Sessions Court judgment can be made binding upon and prejudice the rights of appellant even though he was not a party to the suit, should not the appellant have been able to use that judgment in his favor and had appellee Ted McKay declared negligent as a matter of law by virtue of the General Sessions Court judgment? From the inception of the litigation through his final argument to the jury, appellee McKay consistently maintained the position that he was not negligent. This position did not change when the General Sessions Court ruled that he was negligent and contributed to the cause of the accident. As shown by his pleadings and argument, appellee McKay resisted affirmative use of the General Sessions judgment by the appellant. However, appellee was allowed to use it for the purpose of drastically reducing appellant's deserved jury award.

III

**Under the Doctrine of Election of Remedies
Appellee Ted McKay Is Equitably Estopped From
Making Affirmative Use of the Res Judicata
Argument in View of His Position, Adopted at
the Pre-Trial Conference and During the Trial,
That Appellee McKay Was in No Way Responsible
for the Damages Suffered by Appellant**

It is appellant's contention that had appellee McKay not adopted inconsistent positions in his pre-trial pleadings, to wit, that appellee McKay was not liable, appellant would not have entered a settlement agreement with the "host driver," Melvin Smith. A chronology of events is pertinent.

Appellee Ted McKay originally denied that he was in any way at fault in causing the accident in question. McKay filed a crossclaim against appellee Smith. At the Pre-Trial Conference, held on May 15, 1967, appellee McKay again denied that he was negligent. McKay inconsistently alleged

that if he was found negligent he was entitled to contribution as a matter of law. Subsequent to the Pre-Trial Conference, and prior to trial, appellant settled his cause of action with Melvin Smith for \$7,000.00. Appellant did so upon the belief that the jury would absolve Melvin Smith from liability for damages, which the jury in fact did. Had appellee relied upon the *res judicata* doctrine and not adopted an inconsistent position, appellant would not have entered the settlement agreement that was to ultimately deprive him of his rights.

The two remedies sought by appellee McKay, to wit, absolute relief and contribution, were inconsistent and irreconcilable and induced appellant to adopt a position he would not otherwise have taken. Thus the doctrine of "election of remedies" precluded appellee from resorting to the position which proved most beneficial to him and detrimental to the appellant. *Equitable Trust Co. of New York v. Connecticut Brass & Mfg. Corp.*, 10 F.2d 913 (2d Cir. 1926); *In re Certain Carriers*, 255 F.Supp. 290 (1966) *North Am. Graphite Corp. v. Allan*, 87 U.S.App.D.C. 154, 184 F.2d 387 (1950).

It is an established policy of the law to encourage settlements. The trial court's ruling has a detrimental effect upon this policy.

CONCLUSION

Counsel respectfully submits that this Court should reverse the District Court's ruling that appellee McKay was entitled to contribution as a matter of law, and should order a judgment entered for appellant against appellee McKay in the amount of \$30,000.

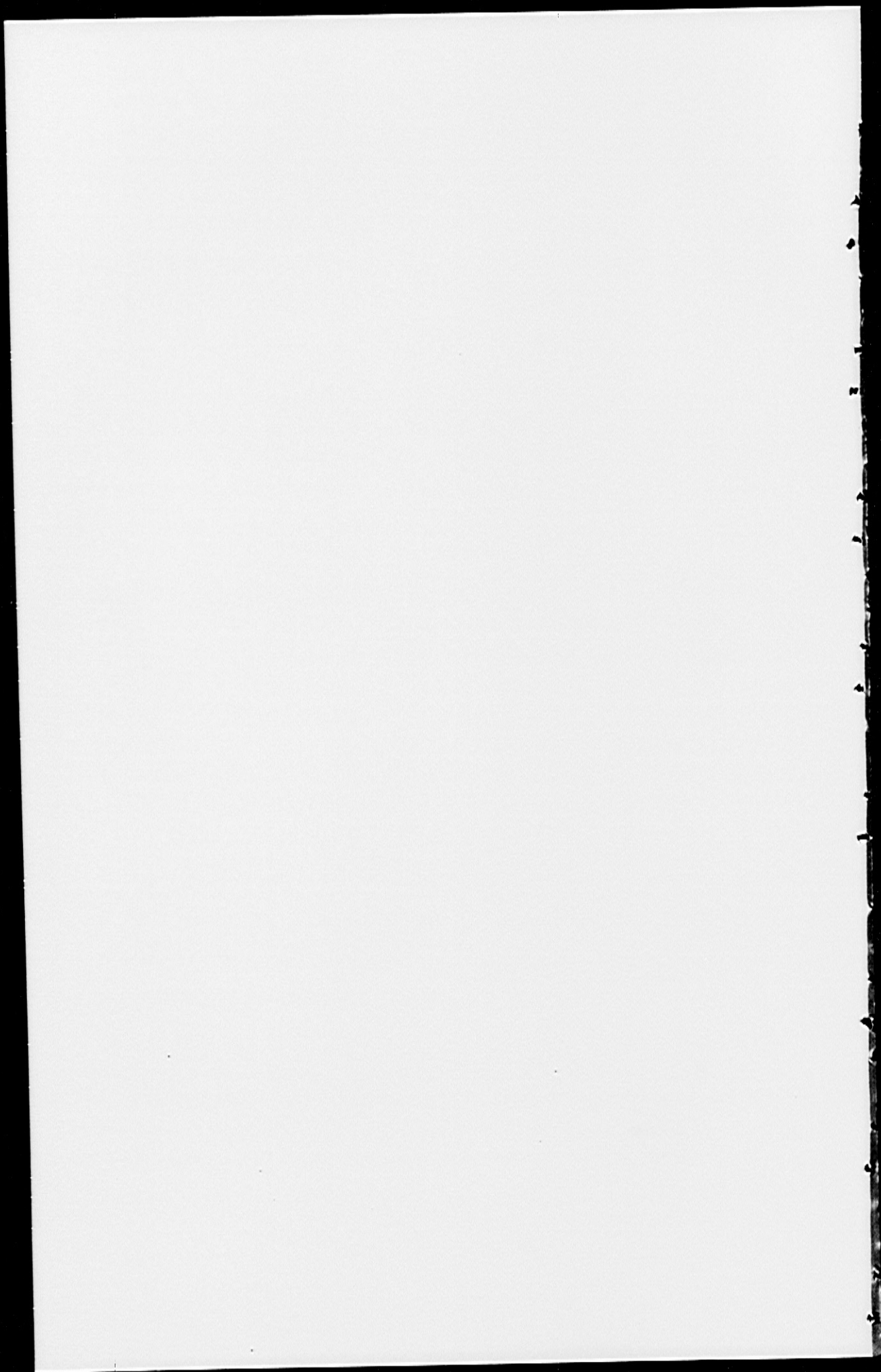
Respectfully submitted,

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JOINT APPENDIX

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WILLIE G. BRIGHTHART	)	
	)	
Plaintiff	)	
v.	)	
TED McKAY	)	Civil Action
	)	No. 2681-65
and	)	
	)	
MELVIN SMITH	)	
	)	
Defendant	)	

AGREED STATEMENT OF FACTS

Pursuant to Rule 76 of the Federal Rules of Civil Procedure, the following statement is made.

Plaintiff Willie G. Brighthart brought suit against defendants Ted McKay and Melvin Smith for personal injuries sustained in an automobile accident that occurred on August 9, 1965, near Seventh and M Streets, N.W., Washington, D. C. Smith's car, in which plaintiff was a passenger, proceeded north on Seventh Street and collided with McKay's car which had been headed in the opposite direction, but at the moment of the accident, was turning left on to M Street, N.W.

By their pleadings, both defendants denied that they were at fault and each entered a cross claim asserting that the other defendant was either negligent or contributorily negligent in causing the resulting injuries to Brighthart.

At Pre-trial the defendant McKay entered a further allegation as to his cross claim against the defendant Smith:

"Further, McKay alleges that if he is in fact found negligent that he is entitled to a judgment for con-

tribution against D Smith as a matter of law in that the Honorable Judge Mary Barlow in the District of Columbia Court of General Sessions has judicially determined that Melvin Smith was guilty of contributory negligence in this action. See Civil Action No. GS 22593-65 Melvin Smith v. Ted McKay."

Prior to trial, the plaintiff settled his cause of action against defendant Melvin Smith for \$7,000.00 without notice to defendant McKay. (See Defendant McKay's Exhibit #3.)

Subsequent to the filing of suit and prior to trial in the instant case, defendant Smith sued defendant McKay in the District of Columbia Court of General Sessions for damages resulting from the accident in question. The plaintiff was not a party to that law suit. Judge Mary Barlow of that Court heard the case without a jury and held that Smith could not recover from McKay. Judge Barlow made a finding of negligence and contributory negligence on the part of McKay and Smith in that case.

The case was presented to the jury in its original form, to wit, Brighthart versus both McKay and Smith, and the defendant McKay against Smith on his cross claim. The jury was not appraised that the settlement had occurred.

At the trial of the instant case on January 11 and 12, 1968, in this Court, the jury found for the plaintiff against McKay in the amount of \$50,000.00. The jury further found for defendant Smith on the plaintiff's complaint. In presenting his defense to the case the defendant McKay also presented evident on his cross claim. There was submitted into evidence a transcript of Judge Barlow's finding in the District of Columbia Court of General Sessions case of *Smith v. McKay*, and a certified copy of the judgment in that case. (See defendant McKay's Exhibits #1 and #2.)

Defendant McKay claimed contribution against defendant Smith and after the verdict was rendered in this case, the Court concluded as a matter of law that McKay was entitled to contribution because the judgment of the District of Columbia Court of General Sessions was *res judicata* on that question.

On January 16, 1968, the Court after having taken the matter of contribution under advisement and after hearing further oral argument in Court rendered the following decision by memorandum:

"This matter is now before the court on the defendant McKay's motion for contribution as a matter of law on the record. Briefly, this situation came about as follows. The plaintiff, Brighthart, in Civil Action 2681-65, brought this action against defendant McKay and defendant Smith, claiming damages growing out of an accident at 7th and M Streets, N. W., on August 9, 1965. The defendant McKay lodged a cross-claim against Smith. Before the principal action came on for trial there was a proceeding in the District of Columbia Court of General Sessions, *Melvin Smith v. Ted McKay*, Civil Action G. S. 22593-65, on April 11, 1966. In that proceeding findings were made by the presiding judge that the defendant McKay was negligent and that the plaintiff Smith was contributorily negligent. As a consequence thereof judgment was entered on May 19, 1967, in favor of the defendant McKay. Subsequently, in the principal action, a settlement was effected between the plaintiff Brighthart and Melvin Smith, and on January 12, 1968, a verdict in favor of the plaintiff in the amount of \$50,000.00 was returned. The transcript of the trial before the D. C. Court of General Sessions, including findings; the certified copy of judgment entered in that case; and the release referred to were filed in the instant proceeding, and constitute the basis of the motion of the defendant McKay for contribution from his co-defendant Smith. On this record the defendant McKay claims he is entitled to contribution and cites *Martello v. Hawley*, 112 U.S.App.D.C. 129, and *Yellow Cab Co. v. Janson*, 86 U.S.App.D.C. 38. Upon this unchallenged record and on the authorities cited, the court holds that the Court of General Sessions judgment is *res judicata* as between the defendant McKay and the defendant Smith and that the defendant McKay is therefore entitled to contribution from

the defendant Smith. The court is further constrained to hold that *Martello* is controlling on the instant case as to the effect of the release subsequently entered between Brighthart and Smith. From this it follows that the court should credit the amount of the verdict received against McKay by one-half thereof, and it further follows that the plaintiff, Brighthart, is entitled to judgment in the amount of \$25,000.00 against the defendant McKay. Appropriate judgment form should be presented promptly."

The defendant McKay filed a motion for a new trial, or in the alternative for the denial of a new trial conditioned upon the plaintiff filing a remittitur. The Court, on February 7, 1968, rendered the following memorandum in granting a remittitur:

"Previously in this matter the jury found in favor of Brighthart against McKay in the amount of \$50,000.00 and the court found that McKay was entitled to contribution from the co-defendant, Smith, in favor of which defendant the plaintiff had executed a release, and that McKay was therefore entitled to be credited with payment of one-half of the judgment against him.

"The matter is now before the court on a motion for a new trial or in the alternative a remittitur. There has been full argument by respective counsel.

"The court has concluded that a new trial should be granted unless there be a remittitur by the plaintiff. The court finds that a verdict of \$50,000.00 under the facts of this case, is such as to shock the conscience of the court. The evidence in the case shows out of pocket expenses of approximately \$1,500.00 and injuries to the plaintiff as follows: Following the accident the plaintiff was in the hospital for a week and following his release had difficulty with his eyes, right arm, back pains and headaches. Plaintiff returned to the hospital for surgical repairs of facial scars to the extent possible. Presently, his sight gives him a "little trouble every so often;" he suffers from headaches, sometimes severe, of unspeci-

fied duration, about twice a week; there is an existing and probably permanent weakness of the right shoulder and difficulty in using the right arm at times; and there is permanent scarring of the face and right shoulder. Neither the scars which are still visible nor the other remaining problems were shown to have materially affected his employment. The fact is that plaintiff has missed little time from work, has continued his regular employment and has received promotions and pay increases since the accident. Therefore the central question for the court is whether the scars which are still visible are so disfiguring as to, when considered with plaintiff's other injuries, render a verdict in the amount of \$50,000.00 other than shocking. The conclusion of the court is that they are not and that the verdict of \$50,000.00 was the product of sympathy rather than based upon the evidence.

"In view of the foregoing, the court will grant a new trial unless a remittitur be filed in the amount of \$20,000.00 within ten days. This will leave a judgment in the amount of \$30,000.00, against which defendant McKay will be entitled to a credit of \$15,000.00. Counsel will present appropriate orders."

The plaintiff filed the remittitur on February 19, 1968, reserving the right to appeal the order of contribution:

"The Clerk of said Court will please note the acceptance of the remittitur in the amount of \$20,000.00 without prejudice to the plaintiff's right of appeal."

The action of the trial judge resulted in reducing the judgment against defendant McKay to \$15,000.00.

The trial Court entered the following Judgment, Findings of Fact, Conclusions of Law and Order:

JUDGMENT

"This case came before the Court for jury trial on the claim of the plaintiff Willie G. Brighthart against the defendants Ted McKay and Melvin Smith. Further a cross claim filed by the defendant Ted McKay against the defendant Melvin Smith came on for trial as a non jury matter.

"On January 12, 1968, at the conclusion of the trial the jury rendered a verdict on behalf of the plaintiff Willie G. Brighthart against the defendant Ted McKay only in the amount of \$50,000.00.

"At the trial the defendant Ted McKay presented to the Court evidence in support of his cross claim for contribution. This evidence consisted of a certified copy of the judgment and transcript of the proceedings in the District of Columbia Court of General Sessions, Civil Action No. GS 22593-65, entitled *Melvin Smith v. Ted McKay*. The certified copy of the transcript and judgment showed that the Court made findings of negligence and contributory negligence on the part of Ted McKay and Melvin Smith as a result of the accident of August 9, 1965, which is the same accident from which this litigation arose.

"It was further stipulated by the parties that prior to trial the plaintiff Willie G. Brighthart and the defendant Melvin Smith had entered into a release.

"In connection with the cross claim of the defendant Ted McKay against the defendant Melvin Smith for contribution, the Court makes the following findings of fact and conclusions of law:

Findings of Fact

"1. That Melvin Smith filed suit against Ted McKay in Civil Action No. GS 22593-65, and that on April 11, 1966, trial was held in that matter at which time the Honorable Catherine B. Kelly, Associate Judge, District of Columbia Court of General Sessions, made a finding that the defendant Ted McKay was negligent and that the defendant Melvin Smith was contributorily negligent.

"2. That a certified copy of the judgment was entered into evidence and the Court finds that such a judgment is a final judgment.

"3. That prior to trial the plaintiff Willie G. Brighthart and the defendant Melvin Smith entered into a release.

Conclusions of Law

"Upon the foregoing findings of fact, this Court concludes as a matter of law that the defendant Ted McKay is entitled to contribution against the defendant Melvin Smith since such judgment in the District of Columbia Court of General Sessions is *res judicata* on the claim for contribution by Ted McKay against Melvin Smith in this action.

"Thus the defendant McKay will receive a credit of fifty per cent (50%) of the final amount of judgment.

"Following the verdict of the jury on behalf of the plaintiff against the defendant Ted McKay in the amount of \$50,000.00, the defendant Ted McKay filed a motion for new trial, or in the alternative, requested denial of such a motion for new trial conditioned upon plaintiff Willie G. Brighthart filing a remittitur. After examining memoranda filed by counsel and after oral argument in open Court, it is the conclusion of the Court that the motion for new trial be denied upon the condition that the plaintiff herein file a remittitur in the amount of \$20,000.00, thereby reducing the verdict of the jury to the amount of \$30,000.00.

"It is, therefore, by the Court on this ___ day of February, 1968,

"ORDERED, that judgment be entered on the jury verdict on behalf of Willie G. Brighthart against the defendant Ted McKay only in the amount of \$50,000.00 plus interest and costs.

"ORDERED, that judgment be entered for contribution on behalf of the defendant Ted McKay against the defendant Melvin Smith for contribution and that the defendant Ted McKay receive a credit of fifty

per cent (50%) of the final amount of the judgment.

"ORDERED, that the motion for new trial filed by the defendant Ted McKay be and the same is hereby denied upon the condition that the plaintiff file within ten (10) days a remittitur in the amount of \$20,000.00, thereby leaving a final judgment on behalf of the plaintiff Willie G. Brighthart against the defendant Ted McKay in the amount of \$30,000.00.

/s/

Richmond B. Keech
Judge United States
District Court"

Judge

HOLFORD & CAULFIELD

Donald J. Caulfield

SISK & CRAMER

M. Michael Cramer

COLLINS, ANDERSON, AHERN,
QUINN & WYLAND

Robert E. Anderson

NOTICE OF APPEAL

Notice is hereby given this ___ day of February, 1968, that plaintiff Willie G. Brighthart hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 15 day of February, 1968 in favor of Willie G. Brighthart against said both defendants, Ted McKay and Melvin Smith.

Attorney for
Plaintiff

Please notify:

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and Robert Anderson, Esquire
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Washington, D.C.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,813.

WILLIE G. BRIGHTHART,

Appellant,

v.

TED MCKAY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

United States Court of Appeals

IN THE DISTRICT OF COLUMBIA

FILED AUG 1 1968

William J. Paulino
CLERK

BOND L. HOLFORD

DONALD I. CAULFIELD

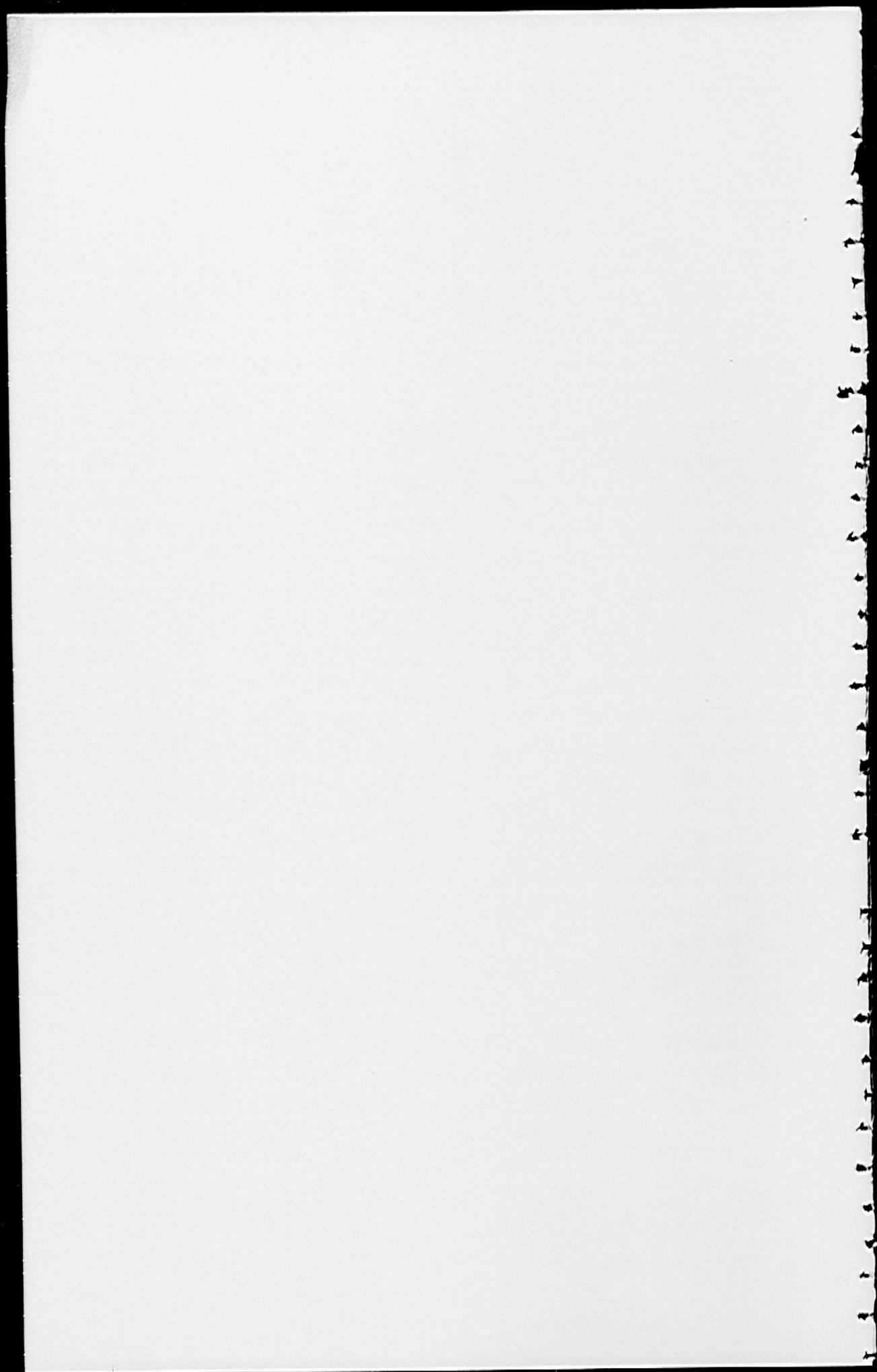
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527-7690



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IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 21,813

WILLIE G. BRIGHTHART,
Appellant,

v.

TED McKAY,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

STATEMENT OF ISSUES PRESENTED

In the opinion of appellant, the following issues are presented:

1. Whether the finding by the Court of General Sessions that the collision in question was caused by joint negligence of defendants, McKay and Smith, was consistent with the position of appellant and appellee in the District Court and was res judicata on this issue?

2. Whether the trial court properly ruled that defendant Smith was liable to defendant McKay for contribution in view of the finding by the Court of General Sessions that each was guilty of negligence which caused the collision in which appellant was injured, and that in view of the verdict of \$30,000 and of appellant's settlement of Smith's liability for \$7,000, the verdict should be credited with one-half of its original amount and McKay should be required to pay only the remaining balance?

3. Whether appellant was aggrieved by the trial court's application of the doctrine of res judicata and entry of the judgment of contribution and therefore can raise questions as to their validity by an appeal to this Court?

COUNTERSTATEMENT OF CASE

A. Preliminary Statement

Ted McKay, appellee herein, hereby supplements appellant's statement of the case in order to correct certain statements and to supply certain omissions of appellant. Appellee thus seeks to present the facts in their proper perspective and to focus attention on the essential questions raised in this appeal.

B. Facts and Proceedings Below

1. *Pleadings:*

On October 27, 1965, appellant filed a complaint in the United States District Court for the District of Columbia seeking damages for personal injuries resulting from a collision which occurred within the intersection of Seventh and "M" Streets, N.W., Washington, D.C., on August 9, 1965, between a northbound car owned and operated by defendant Melvin Smith and a southbound car owned and operated by defendant Ted McKay. The complaint alleged that both defendants "drove their cars in a negligent and reckless manner so as to collide with each other and cause damage to the plaintiff". Defendant Smith filed an answer in which he denied negligence on his part and alleged that

plaintiff's "injuries and damages were caused by the sole negligence of the co-defendant, Ted McKay". McKay filed an answer in which he denied he was negligent and he also filed a cross-claim for contribution alleging that defendant Smith was negligent and that if McKay was found negligent, he was entitled to contribution from Smith as a joint tortfeasor.

2. Suit by Smith against McKay for damages:

Thereafter, Smith sued McKay in the District of Columbia Court of General Sessions for damages he sustained in the collision which he alleged resulted from McKay's negligence. The case was tried before Judge Mary Barlow, who found that McKay was guilty of negligence and that Smith was guilty of contributory negligence. Judge Barlow accordingly entered a judgment for McKay.

3. Pretrial proceedings:

Some time thereafter, on May 15, 1967, pretrial proceedings were conducted in the District Court. On this occasion, plaintiff Brighthart reasserted his original position that the accident, his injuries and damages were caused by the negligence of and violations of D.C. Traffic Regulations by defendants McKay and Smith. In these pretrial proceedings, McKay presented the details of the trial before Judge Barlow and claimed a judgment for contribution by estoppel, collateral estoppel, or res judicata based on the finding by the Court of General Sessions that Smith was guilty of contributory negligence.

4. Plaintiff's settlement with Smith before trial:

Subsequent to the pretrial proceedings, plaintiff settled his cause of action against Smith and gave him a release for \$7,000 (printed as appendix on pages 18-19, *infra*). This action was without notice to McKay.

5. Trial proceedings:

The case was presented to the jury in its original form, with (a) Brighthart as plaintiff and McKay and Smith as defendants, and (b) defendant McKay as cross-claimant and

Smith as cross-defendant on McKay's cross-claim for contribution. The jury was not told that the settlement had occurred.

In presenting his case, McKay continued to press his claim for contribution against Smith. To prove his cross-claim, he put into evidence a transcript of the finding by the Court of General Sessions and a certified copy of its judgment. On the basis of the finding and judgment against Smith, McKay moved for a judgment of contribution in the District Court. The trial judge announced he would take the matter under advisement, and in the meantime would let the case go to the jury, subject, however, to the court's ruling thereafter on the motion for a judgment of contribution in favor of McKay.

The jury found for plaintiff and against McKay and assessed the damages in the amount of \$50,000. The jury also found for Smith on plaintiff's complaint.

After the verdict the trial judge heard oral arguments on the matter of contribution and took it under advisement. He concluded that as a matter of law McKay was entitled to contribution because the finding and judgment of the Court of General Sessions were res judicata on the question involved. The court's memorandum decision is set forth on pages JA 3-4 of the Joint Appendix.

Defendant McKay thereafter filed a motion for a new trial, or, in the alternative, for the denial of a new trial conditioned on the plaintiff's filing a remittitur. The court filed a memorandum, set forth on pages JA 4-5 of the Joint Appendix, agreeing with McKay's motion for a new trial or for a remittitur. The court rendered a memorandum, in ordering a remittitur of \$20,000, which stated that it found that the "verdict of \$50,000, under the facts of this case is such as to shock the conscience of the Court" and "was the product of sympathy rather than based upon the evidence." Plaintiff accordingly filed a remittitur of \$20,000 "without prejudice" to his right to appeal the contribution-res judicata aspect of the court's decision. The action of the trial

judge resulted in reducing the judgment against McKay from \$30,000 to \$15,000, based on the operation of the remittitur and the right of contribution stemming from the Court of General Sessions proceedings. The findings of fact, conclusions of law, order and judgment of the District Court are set forth on pages JA 6-8 of the Joint Appendix.

C. Inaccuracies in Appellant's Statement of Facts

The brief of appellant contains several inaccurate statements. Contrary to his statement on page 4, the trial court did not rule that the judgment of the Court of General Sessions "was res judicata and binding on appellant Bright-hart". The court, in fact and in law, held (a) that this proceeding was binding on defendant Smith, (b) that he was therefore a joint tortfeasor in the District Court suit, (c) that he should accordingly contribute one-half of the damages assessed in the verdict, (d) that he had made a settlement with plaintiff, (e) that plaintiff, by his settlement with Smith, had sold one-half of his claim for damages, (f) that the verdict was for more than twice the settlement, (g) that the verdict should be credited with one-half its total amount, and (h) that McKay should be required to pay only one-half the original verdict less one-half of the remittitur.

On page -i- in Question 5 and on page 5 in his statement of points, appellant implies that appellee mislead him in such a manner as to impel him to settle his claim against Smith. This indirect statement is completely without any basis. During all this lawsuit, McKay had consistently contended that Smith was guilty of negligence and that the right of contribution prevailed if McKay was found to have been jointly negligent.

Appellant makes inconsistent statements as to the reasons why he settled with Smith for \$7,000 and gave him a release after the judgment of the Court of General Sessions and after the pretrial proceeding. On page 3 of his brief, appellant says that he settled because he "correctly predicted that on the basis fo the traffic regulations and the

clear facts of the case, the District Court jury would absolve the 'host driver', Melvin Smith, from liability notwithstanding the result of the General Sessions Court suit". But on page 5 in part 3 of his summary of argument, appellant says that appellee's "contradictory positions . . . mislead the appellant and caused him to enter a detrimental settlement with a co-defendant".

SUMMARY OF ARGUMENT

From the outset and throughout the entire proceeding below in the District Court, appellee McKay had consistently claimed (a) that the collision, which is the subject matter of the instant lawsuit, resulted from the negligence of defendant Smith, (b) that if McKay did in fact contribute to the cause of the collision then he and Smith, as joint tortfeasors, each had the right of contribution against the other.

This issue of the joint liability of Smith and McKay was expressly and directly raised and decided in Smith's suit against McKay in the Court of General Sessions for damages Smith sustained as a result of the collision. There the court specifically found that the negligence of each driver caused the impact of their cars. Based on its finding of negligence by McKay and contributory negligence by Smith, the court entered a judgment for McKay. If Smith had not been negligent, the collision would not have occurred. Hence neither he nor plaintiff Brighthart would have sustained any damages.

This finding of joint negligence of Smith and McKay and the entry of the judgment for McKay are res judicata as to the issue of joint negligence. They were made by a court of original and competent jurisdiction in relation to the subject matter and the parties. The lawsuit before the court involved, in every sense, a live, genuine, mature and adversary proceeding. The finding that Smith and McKay were jointly negligent in causing the collision was a final and binding determination on this very issue in Brighthart's suit against them in the District Court. He had sued Smith and McKay on precisely the same theory that as joint tort-

feasors they had caused the collision which resulted in his injuries and he reasserted it during the pretrial hearing.

The rights claimed by the parties to the instant lawsuit are mutually exclusive. Brighthart's suit was based on the joint common-law liability of Smith and McKay. Smith's claim against McKay for damages only to himself likewise rested on the common law. And McKay's claim for contribution was an equitable right based on the contingency of joint liability.

In the present case, appellee McKay should be required to pay only one-half the verdict of \$30,000 following plaintiff's remittitur of \$20,000. Plaintiff settled with defendant Smith for \$7,000 and gave him a release. Thus plaintiff sold one-half of his claim for damages. Since the verdict figure is more than twice the settlement figure, the verdict should be credited with one-half of its total amount and McKay should pay only the remaining balance, namely one-half the total original verdict after remittitur.

In view of the foregoing, the District Court's disposition of the lawsuit was proper. Appellant Brighthart was entitled to a recovery of only \$15,000 against McKay and the District Court accordingly entered a judgment in this amount. It follows that Brighthart lacks a legal interest in the District Court's judgment (a) for contribution on behalf of McKay against Smith and (b) for credit to McKay of one-half the final amount of the judgment. Appellant Brighthart was not aggrieved by the District Court's (a) res judicata treatment of the finding by the Court of General Sessions that Smith and McKay were joint tortfeasors and (b) judgment of contribution in favor of McKay. Therefore, the judgment below is not appealable at the behest of Brighthart.

ARGUMENT

- A. THE FINDING BY THE COURT OF GENERAL SESSIONS THAT THE COLLISION IN QUESTION WAS CAUSED BY JOINT NEGLIGENCE OF DEFENDANTS MCKAY AND SMITH WAS CONSISTENT WITH THE POSITION OF APPELLANT AND APPELLEE IN THE DISTRICT COURT AND WAS RES JUDICATA ON THIS ISSUE.

The trial court properly treated as res judicata the finding by the Court of General Sessions that the joint negligence of defendants Smith and McKay caused the collision, in the course of which plaintiff Brighthart, a passenger, was injured. Several cases in this jurisdiction and elsewhere amply support this point.

Bair v. Bryant, 96 A.2d 508 (Mun. App. D.C., 1953) involved a collision between automobiles of Bair and Bryant. One Enloe, a passenger in Bryant's car, sued Bryant and Bair in the District Court for injuries. Thereafter, before either he or Bryant had answered the District Court complaint, Bair sued Bryant in the Municipal Court for the District of Columbia for damage to his car. Bryant subsequently filed his answer in the District Court and Bair also filed his answer in the District Court and at the same time filed a cross-claim against Bryant for contribution. Bryant later answered Bair's cross-claim in the District Court and he also cross-claimed against Bair for contribution and for damage to his car. The Court at page 510 posed one issue as follows:

Did Bair by suing Bryant in the Municipal Court for damages and cross-claiming against Bryant for contribution in the District Court attempt to split his cause of action against Bryant?

The Court answered in the negative, observing that Bair's claim for damages was a common-law claim and his claim for contribution was equitable one in nature. The court said that the right to damages, if established, would rest on

Bryant's liability to Bair and the right to contribution, if established, would rest on a common liability of Bryant and Bair to Enloe. At page 510 the court said:

The right to damages and the right to contribution are mutually exclusive, for Bair can recover damages only if he was free from negligence and will be entitled to contribution only if he was negligent and his negligence combined with that of Bryant to cause Enloe's injuries.

To the same effect is *Scharine v. Huebsch*, 203 Wis. 261, 234 N.W. 358 (1931).

On the question of jurisdiction, the court in *Bair v. Bryant* noted that the District Court action had preceded that in the Municipal Court. It was, however, an action by Enloe against Bryant and Bair. When Bair sued Bryant in the Municipal Court, there was not pending in the District Court an action between Bryant and Bair. Therefore, as between them, the Municipal Court action was prior in time. The fact that Bair and Bryant were co-defendants in the District Court did not compel them to assert their claims against each other by way of cross-claim. At page 511 the court said:

... if the rule of first jurisdiction is to apply here, the Municipal Court first acquired jurisdiction of Bair's claim against Bryant. It is true that if the Municipal Court action is first tried and the issue of negligence and contributory negligence as between Bryant and Bair is settled, it will probably operate as res judicata on their respective claims against each other for contribution in the District Court ...

The court cited *Yellow Cab Co. of D.C. v. Janson*, 86 U.S. App. D.C. 38, 179 F.2d 54 (1949), the case on which the trial judge relied in part in the case of appellant. The other supporting case, *Martello v. Hawley*, 112 U.S. App. D.C. 129, 300 F.2d 721 (1962) was decided nine years after *Bair v. Bryant*.

In *Smith v. Leigh*, 101 U.S. App. D.C. 225, 248 F.2d 85 (1957), this Court referred to *Bair v. Bryant* on the point of jurisdiction and at page 227 said:

We also have in mind the rule in *Kline v. Burke Construction Co.*, but that contemplated courts of coordinate jurisdiction; and also the rule in *Bair v. Bryant*, but that treated of separate causes of action, one for damages and the other for contribution. And we have in mind the general rule that the court which first acquires jurisdiction over a controversy should continue with it, but the cases in which that rule has been applied appear generally to have involved courts of coordinate jurisdiction.

Although appellant for some unstated reason did not cite or discuss *Bair v. Bryant*, it has not been reversed, questioned or weakened in any later case. On the contrary, it has been cited with approval in *Heller v. Edwards*, 104 A.2d 528 (Mun. App. D.C. 1954) on the point that where, as here, the Court of General Sessions has jurisdiction of a case, it should hear it. *Sparrow v. Nerzig*, 228 S.C. 277, 282, 89 S.E.2d 718 (1955) also cites *Bair v. Bryant* with approval on the question of jurisdiction. Moreover, this case is consistent with *Yellow Cab Co. v. Janson*, supra. This case involved a collision between a cab and another car, with the result that the car was damaged and a passenger was injured. In a suit by the driver of the damaged car against the cab company the defense of contributory negligence failed and a judgment was rendered against the cab company. In a suit by the passenger against the cab company, this Court held that the judgment in the previous action between the cab company and the other driver was res judicata on the issue of contributory negligence.

The *Yellow Cab* case is cited with approval in *Radmacher v. Cardinal*, 264 Minn. 78, 117 N.W.2d 738 (1962), where the same res judicata result obtained. At page 742 the court said:

In arriving at this conclusion we find support in *National Farmers Union Property & Cas. Co. v. Fisher* (8 Cir. 284 F.2d 421). There two passengers sued two drivers, and the drivers cross-claimed for personal injury. The jury found both drivers guilty of negligence

which caused the collision. In a subsequent action a third passenger brought an action against a single driver who then sought contribution from the other driver. In an opinion written by Judge Sanborn the court held that the prior action precluded the second joint tortfeasor from denying that the collision resulted from the concurrent negligence of both drivers . . . (citing also *Sullivan v. Gist*, 159 F. Supp. 928 (E.D. Pa., 1958)).

In 1960 the court in *National Farmers Union Property & Cas. Co. v. Fisher* 284 F.2d 421 (8 Cir. 1960) said that the Minnesota rule of res judicata and related collateral estoppel is the same as the general rule almost universally applicable. The court quoted the classic statement of the rule of res judicata in *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1897) and cited several other cases, including *United States v. Munsinger, Inc.*, 340 U.S. 36, 38 (1950) and *Cromwell v. County of Sac*, 94 U.S. 351, 352-353 (1876).

In *Sullivan v. Gist*, 159 F. Supp. 928 (E.D. Pa., 1958), cited by the court in *Radmacher*, supra, a collision between one Rector, a cab driver, and one Gist resulted in three lawsuits. In the first, the cab driver sued Gist. In the second, passengers in the cab sued both the cab company and Gist. These two cases were consolidated for trial. The verdicts were against Gist and in favor of the (a) cab driver, (b) the cab company and (c) the cab passengers. Thereafter, Mr. and Mrs. Sullivan, passengers in the Gist car, sued Gist in a third action. He impleaded the cab company by way of a counterclaim. The cab company then moved for a summary judgment based on the verdicts and judgments in the other two consolidated suits. The court answered in the affirmative the question whether the prior suits barred the counterclaim of Gist against the cab company in the suit the Sullivans brought against him. At page 930 the court quoted § 99 of the Restatement, Judgments (1942) and said:

The instant third-party complaint alleges as the sole basis of Yellow Cab's liability that the cab was operated in a careless manner. Since the question of the cab driver's (Rector's) contributory negligence was necessarily decided adversely to Gist in the prior action, there is nothing further for this Court or a jury to consider. The case comes squarely within § 99 of the Restatement. While it is true that the plaintiffs in this action were not parties to the prior action between Gist and Rector, this in no way affects the fact that as between the third party plaintiff, Gist, and the third party defendant, Yellow Cab Co., the prior judgment is *res judicata* . . . The fact that the present plaintiffs were not parties to third litigation settling the question of Rector's negligence cannot, therefore, militate against the finality of that judgment. *Yellow Cab Co., of D.C., Inc. v. Janson*, 1949, 86 U.S. App. D.C. 38, 179 F.2d 54.

It is noteworthy that the court cited with approval *Yellow Cab v. Janson* and was itself cited with approval in *Radmacher* which also cited with approval the *National Farmers Union* case. And see *Smith v. John Wesley Hood and Diplomat Cab Company, Inc.*, No. 21, 399, U.S. App. D.C., decided May 1, 1968, where this Court said that "while the doctrine of collateral estoppel may be in a flux . . ." there is "a trend towards barring relitigation of an issue by a one-time loser . . ."

It is clear from the cases that appellant's repeated assertions that Smith was not at fault and that the jury absolved him from liability for appellant's injuries are irrelevant in view of the established doctrine of *res judicata* as applied to this record. The trial court therefore properly held that the finding of joint negligence by the Court of General Sessions was binding in the District Court case.

B. THE TRIAL COURT PROPERLY RULED THAT EACH DEFENDANT WAS LIABLE TO THE OTHER FOR CONTRIBUTION IN VIEW OF THE FINDING BY THE COURT OF GENERAL SESSIONS THAT EACH WAS GUILTY OF NEGLIGENCE WHICH CAUSED THE COLLISION IN WHICH APPELLANT WAS INJURED, THAT IN VIEW OF THE VERDICT OF \$30,000 AND OF APPELLANT'S SETTLEMENT OF SMITH'S LIABILITY FOR \$7,000, THE VERDICT SHOULD BE CREDITED WITH ONE-HALF OF ITS AMOUNT AND MCKAY SHOULD BE REQUIRED TO PAY ONLY THE REMAINING BALANCE.

The trial court based its judgment of contribution as discussed above on *Martello v. Hawley*, 112 U.S. App. D.C. 129, 300 F.2d 721 (1962). This case is still the law on the contribution aspects of this lawsuit. In that case two cars collided and a passenger was injured. He settled with his driver for \$700 and gave him a release. He then sued the second driver who filed a third-party complaint against the first driver for contribution. The jury found for the passenger against the second driver for \$2,000 and for the second driver against the first driver. This Court affirmed the trial court's application of the doctrine of contribution and judgment against the second driver for \$1,000. This Court held that in the factual circumstances of the case when a settlement is made with one joint tortfeasor and later a verdict is obtained against the other, the jury finds that the settling tortfeasor should contribute, then the verdict should be credited with one-half its total amount and the non-settling tortfeasor should be required to pay only the remaining balance, namely, one-half of the total original verdict. The Court said that "by his settlement, the plaintiff has sold one-half his claim for damages". (Page 724)

To the same effect is *Smootz v. Ienni*, 37 N.J. Super. 529, 117 A.2d 675 (1955) which this Court cited in footnote 4 on page 724 in support of its ruling. The *Smootz* case was an action for injuries sustained by plaintiff when the defendant's taxicab, in which plaintiff was a passenger,

collided with another car. The defendant cab company filed a third-party complaint against both the driver and the owner of the second car and sought relief by way of contribution. At page 677 the Court said:

Clearly then the enunciated rule is that an injured person who settles his case with one of several defendants will, for the purpose of giving effect to the design of the Joint Tortfeasors Contribution Law, be deemed to have thereby relieved the remaining solvent tortfeasors of the necessity of the necessity of seeking contribution from the settler of his proportionate share of the injured's judgment against them by crediting such share against the judgment before it is finally entered.

C. APPELLANT WAS NOT AGGRIEVED BY THE TRIAL COURT'S APPLICATION OF THE DOCTRINE OF RES JUDICATA AND ENTRY OF THE JUDGMENT OF CONTRIBUTION AND THEREFORE CANNOT RAISE QUESTIONS AS TO THEIR VALIDITY BY AN APPEAL TO THIS COURT.

The appellant Brighthart was not a party to the cross claim filed by McKay against Smith. It is basic in the law of appellate procedure that a person appealing from a judgment must have a direct, immediate, pecuniary or other substantial interest therein. A party has an "appealable interest" only when his property may be diminished, his burdens increased or his rights detrimentally affected by the judgment sought to be reviewed. In *Barksdale v. Morgan*, 34 App. D.C. 549 (1916) this Court held that an appeal did not lie by an executor from an order made in an equity cause sustaining an exception to a report of the auditor allowing the claim of an attorney for a fee for professional services in acting for the executor in a contest over the validity of the will. The attorney had performed the services under an order of the probate court authorizing the executor to employ counsel. This Court held that the executor had no interest in the claim and that the disallowance of the claim did not in any sense legally aggrieve the

executor. The Court accordingly granted a motion to dismiss the appeal. In *Hawley v. Hawley*, 72 App. D.C. 357, 114 F.2d 505 (1954) this Court cited *Barksdale v. Morgan* with approval and at page 359 said:

The District of Columbia Code provides and this court has held that an appeal can be taken only by one who is directly aggrieved by the order appealed from. No such showing has been made in this case.

Support for this doctrine is found in several other cases. In *Queensboro Farms Products v. Wickard*, 37 F.2d 969 (2 Cir. 1943) the court at page 977 said:

A person cannot ordinarily raise a question as to the validity of aspects of official action which do not adversely affect his own legally protected interests.

In *Milgram v. Loew's, Inc.*, 192 F.2d 579 (3 Cir. 1951) the court at page 586 said:

The second question before us is the motion of plaintiff to dismiss the appeal of the intervening defendants . . . The sole problem for our consideration is whether those intervenors have been legally aggrieved in any way by the decree entered below. It is settled law that even a party cannot appeal from a decision which is not adverse to him. . . . We think plaintiff's motion to dismiss the appeal should be granted.

To the same effect are *In Re Michigan-Ohio Bldg. Corporation*, 117 F.2d 191 (7 Cir. 1941) and *United States v. Adamant Co.*, 197 F.2d 1 (9 Cir. 1952). In *Luckenbach v. Laer*, 190 Cal. 395, 212 P. 918, 920 (1923) the court dismissed an appeal of parties against whom a receiver had been directed to take action. After holding such parties proper appellants under the statute, the court, referring to a court order and reiterating that only aggrieved parties may appeal, at page 399 said:

Only aggrieved parties may appeal . . . Nothing was attempted thereby to be taken away from the

appellants . . . We find no cases holding that some remote consequence which may flow from an order will render a party aggrieved thereby. The right invaded must be immediate.

In view of the doctrines of res judicata and contribution as formulated in *Yellow Cab Co. v. Janson*, *Martello v. Hawley* and other cases discussed above, appellant was not aggrieved by the action of the trial court. Appellant had a verdict for \$30,000 but sold one-half of this liability for \$7,000. He is entitled only to payment of the remaining half. Since the trial court gave him a judgment against appellee for \$15,000 he has lost nothing, and therefore has no justiciable interest sufficient to maintain this appeal.

CONCLUSION

The issues raised by appellant on this appeal are collateral and are not framed so as to cope with the real issues presented. Appellant could hardly have been prejudiced by the trial court's rulings on the matters of res judicata and contribution as he was fully protected in relation to that one-half of his claim for damages which he did not settle. The decisions of this Court in *Yellow Cab Co. v. Janson*, *Martello v. Hawley* and *Barksdale v. Morgan* and the decision of the District of Columbia Court of Appeals in *Bair v. Bryant*, supra, are well reasoned and amply supported by authorities from other jurisdictions. Moreover, they have been cited with approval and followed without exception since their promulgation. The pronouncements of the two courts in these four opinions dispose of the issues in this case. In view of the authorities, the trial court had no alternative but to grant defendant McKay's motion for a judgment of contribution. Since this action did not

aggrieve appellant, this Court should dismiss this appeal with prejudice or in the alternative affirm the judgment below.

Respectfully submitted,

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Attorneys for Appellee

APPENDIX

COVENANT AND RELEASE

Know all men by these presents, that whereas on the 9th day of August 1965, the undersigned Willie H. Brighthouse was injured in an automobile accident at 7th and M Streets, N.W., Washington, D.C., as a result of which the undersigned has filed a Complaint for Damages in the United States District Court for the District of Columbia, Civil Action No. 2681-65, against Ted McKay of Cincinnati, Ohio and Melvin Smith of Washington, D.C., and

WHEREAS, the undersigned claims that his injuries and damages were caused by the negligence of Ted McKay and Melvin Smith and has demanded damages in a sum greater than hereinafter mentioned as paid, and

WHEREAS, Melvin Smith denies negligence on his part but nevertheless it being the desire of the parties named herein to avoid further litigation between them on account of said dispute and to forever conclude the claims existing between them, but in such a manner that such settlement shall not impair or affect the undersigned's claims against the said Ted McKay for negligently causing or contributing to cause the said injuries and damages:

NOW, THEREFORE, in consideration of the promises and of the sum of \$7,000.00 paid to the undersigned, the receipt of which is hereby acknowledged, the undersigned hereby agree as follows:

1. That he will dismiss with prejudice Civil Action No. 2681-65 pending in the United States District Court for the District of Columbia as to Melvin Smith, reserving his right to further prosecute said case against Ted McKay;
2. That he hereby covenants and agrees to hold Melvin Smith forever harmless from any and all claims, actions and judgments which may hereinafter result from the prosecution of his claim against the said Ted McKay and specifically with reference to any crossclaim arising out

of the injuries and damages to the undersigned presently pending in Civil Action No. 2681-65 and he further covenants and agrees to hold forever harmless Melvin Smith as to any claims, actions or judgments brought on the undersigned's behalf or as a result of any payment made or service rendered to the undersigned, as a result of the aforesaid accident;

3. That he releases and forever discharges Melvin Smith, his heirs, successors and assigns from all claims of every kind, nature and character whatsoever arising as a result of the accident of August 9, 1965.

It is the intent of this covenant that the said Melvin Smith, his representatives and assigns, shall never at any time be liable beyond the consideration expressed in this instrument by reason of the said injuries and damages allegedly sustained by the undersigned as a result of the accident of August 9, 1965.

In witness whereof I have hereunto set my hand and seal this 7th day of December 1967.

/s/ Willie G. Brighthart
Willie G. Brighthouse

Witness:

/s/ Michael Cramer

/s/ Iaretha Brighthart

Subscribed and sworn to before me this ____ day of December 1967.

Notary Public